SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 199

J. H. CRAIN AND R. E. LEE WILSON, JR., TRUSTEES OF LEE WILSON & COMPANY, A BUSINESS TRUST,
Petitioners,

vs.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

GEO. E. H. GOODNER,
Counsel for Petitioners.

SCOTT P. CRAMPTON,
Of Counsel.

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The petitioners, J. H. Crain and R. E. Lee Wilson, Jr., Trustees of Lee Wilson & Company, a business trust, pray that a writ of certiorari be issued to review the judgment of the Court of Claims entered in the above entitled cause.

Opinion Below.

The opinion of the Court of Claims was entered April 6, 1942 (R. 6), and is reported at 44 F. Supp. 321.

Jurisdiction.

The judgment of the Court of Claims was entered April 6, 1942. The jurisdiction of this Court is invoked under

Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Questions Presented.

1. Did the petition filed in the Court of Claims state a cause of action against the United States and within the jurisdiction of that court?

2. Did the court err in sustaining the demurrer and in refusing petitioners a hearing on the merits?

3. Are petitioners entitled to recover from the United States payments made by them for cotton tax exemption certificates with which to discharge their tax imposed on the ginning of their cotton by the Bankhead Cotton Act of 1934?

Statutes Involved.

The statutes involved are the Bankhead Cotton Act of 1934; the Second Deficiency Appropriation Act, Fiscal Year 1938; and Section 145 of the Judicial Code. The pertinent parts of these statutes are set out in the Appendix, *infra*, pp. 10-18.

Statement.

The Bankhead Cotton Act of 1934 provided that any producer of cotton could market free of tax the amount of cotton produced in the 1934-35 cotton season which did not exceed the allotment made to him by the Secretary of Agriculture, but that any cotton produced in excess of said allotment was subject to a tax of approximately five cents per pound, which tax was payable to the Collector of Internal Revenue in money, or in tax exemption certificates which the farmer might obtain from the Secretary of Agriculture, or his agents, pursuant to his regulations. The Secretary of Agriculture sold the exemption certificates to farmers at four cents per pound. Upon the payment of the

tax either in money or in exemption certificates, the Collector issued bale tags to be attached to the bales of ginned cotton, without which the cotton could not be sold or moved in interstate commerce without subjecting the producer to heavy penalties.

In order to facilitate the issuance of exemption certificates, the Secretary of Agriculture set up a "Pool", with agents thereof in each county, which Pool not only issued the exemption certificates which represented tax free cotton, but also sold certificates to producers who produced more cotton than their allotment. The Pool was supposed to receive the unused exemption certificates from farmers who did not produce their allotted amount of cotton and to sell these to farmers who produced more than their allotments.

Petitioners produced more cotton in the 1934-35 crop year than was allotted to them by the Secretary of Agriculture, thus subjecting themselves to the ginning tax imposed by the Bankhead Act on the excess. They could market that excess cotton, either by paying the Collector of Internal Revenue a tax of not less than five cents per pound, or they could discharge that tax liability by purchasing exemption certificates from the "Pool" at four cents per pound and discharge the tax with those certificates. They chose the lesser of the two evils and purchased from the Pool exemption certificates in the total amount of $65,923.32 with which they paid the tax on the cotton which they produced in excess of their allotments. Said purchases were paid for by bank drafts made payable to E. L. Deal, Certificate Pool Manager, and were endorsed by him over to the Treasury of the United States and were covered into and deposited in the general fund of the United States (R. 2).

Petitioners duly filed with the Collector of Internal Revenue a claim for refund of the amount paid to the "Pool"

for exemption certificates, but said claim was denied by the Commissioner of Internal Revenue on the ground that the tax was not paid in money (R. 3).

The Second Deficiency Appropriation Act for the Fiscal Year 1938 provided for refund of amounts paid as tax under the Bankhead Cotton Act. Petitioners duly filed a claim under that Act for refund of the amounts paid to the Pool for certificates, with which to pay its tax, but that claim was denied on the ground that the amount claimed did not represent taxes paid (R. 3).

Petitioners made timely written demand upon the Comptroller General of the United States, upon the Secretary of the Treasury, and upon the Secretary of Agriculture for refund of the amount paid for exemption certificates. The Commissioner of Internal Revenue replied to all of said demands that no refund or repayment would be made (R. 3).

Each of the claims filed and the demands made, as well as the petition to the Court of Claims, alleges the unconstitutionality of the Bankhead Cotton Act and the payment under duress and compulsion of $65,923.32 to the United States for cotton tax exemption certificates (R. 3). The petition to the Court of Claims also alleges that the amount which petitioners paid for cotton tax exemption certificates was money had and received by the United States for the account of petitioners; that said amount is held in trust for petitioners; and that said amount was the private property of petitioners and of said trust and was taken for the public use without just compensation (R. 4).

Respondent demurred to the petition (R. 5). On April 6, 1942, the Court of Claims filed its Opinion in which it sustained the demurrer and dismissed the petition. One Judge dissented. Another Judge concurred on the ground "that no showing has been made to us sufficient to over-

come the presumed constitutionality of the Bankhead Act" (R. 16).

Specification of Errors to be Urged.

The Court of Claims erred:

1. In failing to hold that the Bankhead Cotton Act was unconstitutional, null, and void.

2. In failing to hold that petitioners' payments for cotton tax exemption certificates were made under duress and compulsion when the purchase of said certificates (or the payment of a larger amount of tax) was required by the Bankhead Cotton Act as a condition precedent to the marketing of any cotton produced by petitioners in excess of their allotment under said Act.

3. In failing to hold that respondent was retaining petitioners' payments under a contract implied in fact when said payments were made under such conditions that the parties would expect repayment when the duress of the Bankhead Cotton Act was removed.

4. In refusing to treat as a fact for purposes of the demurrer petitioners' allegation that "the amounts collected from plaintiffs * * * were covered into the general fund of the Treasury of the United States."

5. In sustaining the demurrer and dismissing the petition when the facts alleged in said petition state a good cause of action against the United States and within the jurisdiction of the Court of Claims.

Reasons for Granting the Writ.

1. The decision below, in holding the Bankhead Cotton Act to be constitutional (R. 8-9), is in direct conflict with *Thompson* v. *Deal*, 92 F. (2d) 478 (C. A. D. C.), and *United*

States v. *Moor*, 93 F. (2d) 422 (5 C. C. A.), each holding such Act to be unconstitutional.

The decision below is in conflict with *Stahmann* v. *Vidal*, N. Mex. Dist. Ct., wherein it was held that the ginning tax was paid under duress, thus giving the plaintiff a right of action, and that the Bankhead Cotton Act was unconstitutional, thus giving plaintiff a right of recovery. The U. S. Circuit Court of Appeals, Tenth Circuit, overruled the lower court on the question of the plaintiff's right to maintain the action and refused to pass upon the constitutional question. This Court granted certiorari on the question of the plaintiff's right to maintain the action and in *Stahmann* v. *Vidal*, 305 U. S. 61, held that the plaintiff could maintain the action, because the tax was paid under duress, and that plaintiff was entitled to recover, obviously, because the law was unconstitutional as held by the trial Court.

The decision of the Court of Claims is in conflict with this Court's decision in *United States* v. *Butler*, 297 U. S. 1, wherein it was pointed out that Congress,

> in the Bankhead Cotton Act, used the taxing power in a * * * minatory fashion to compel submission

of a minority to a coercive act. This Court designated such legislation as "coercion by economic pressure" to enforce the provisions of the Agriculture Adjustment Act which was in that decision held unconstitutional.

In *United States* v. *Moor*, *supra*, the Court referred to the repeal of the Bankhead Cotton Act (49 Stat. 1106, 1155) and said:

> Congress thereby indicated that the Bankhead Act was so intimately related to the Agricultural Adjustment Act that the two should go down together. The two are parts of one plan. It would certainly not be fair to relieve those who had not paid the tax, and deny

> relief to those who had. We are content to hold that the Bankhead Act shares the fate of the Agricultural Adjustment Act.

One of the grounds upon which this Court rested its decision in holding the Agricultural Adjustment Act of 1933 to be unconstitutional was that by Section 12(b) thereof the proceeds derived from taxes imposed by the Act were appropriated for the purpose of carrying out said Act. Section 16(c) of the Bankhead Cotton Act contains the same condemned provision (App. p. 15).

2. The decision of the Court of Claims in holding that the Bankhead Cotton Act exerted no duress or compulsion upon petitioners (R. 14) is in conflict with *Stahmann* v. *Vidal, supra,* and *Thompson* v. *Deal, supra,* which held that the provisions of said Act did exert duress and compulsion upon cotton producers. The substance of the reasoning of the Court of Claims on this point was stated as follows:

> The man who was a little more fortunate would not mind sharing his good fortune with his less favored neighbor (R. 14).

The Circuit Court of Appeals for the District of Columbia, however, considered the operation of the same statute in *Thompson* v. *Deal* and concluded:

> Here the payment was made under such an urgent necessity as to imply that it was made under compulsion, * * *.

Cf. *United States* v. *Butler, supra,* pp. 70-71.

3. The holding of the Court of Claims that the allegations in petitioners' petition "are insufficient to establish an obligation on the part of the United States by way of a contract, either express or implied in fact" (R. 15), is in conflict in principle with *United States* v. *Compagnie Gen-*

erale Transatlantique, 26 F. (2d) 195 (2 C. C. A.), and *Sinclair Nav. Co.* v. *United States*, 32 F. (2d) 90 (5 C. C. A.); Cf. *Carriso, Inc.*, v. *United States*, 106 F. (2d) 707 (9 C. C. A.), and *Bull* v. *United States*, 295 U. S. 247. The first three decisions allowed recovery from the United States of amounts paid as fines or fees under unconstitutional or repealed statutes and the last decision allowed recoupment of taxes paid by mistake under conditions which would not in conscience permit their retention.

It is well established that a contract is implied in fact when it is made, as here, under such conditions that the parties would expect repayment when the compulsion for their actions has been removed. The courts have repeatedly held that such payments create a contractual or quasi contractual obligation between the payor and the government.

The payments sought to be recovered herein were made by petitioners under the unconstitutional Bankhead Cotton Act and amounted to approximately forty per cent of the value of their excess production. A tax of forty per cent of the value of property is tantamount to a fine and should be refunded just as are fines collected under unconstitutional statutes.

4. The failure of the court below to give effect to the allegations of petitioners that their payments were covered into the general fund of the Treasury of the United States (R. 13) is contrary to the well established rule that, for purposes of a demurrer, all facts well pleaded must be taken as admitted. Petitioners' allegations go to the manner in which these payments were actually made—not how the law said they should be made (R. 2-3, 4). The Court of Claims in controverting these allegations of fact has established an unhealthy precedent in legal procedure. Furthermore, the court's holding in this respect is in conflict with many

decisions of the Supreme Court such as *Nalle* v. *Oyster*, 230 U. S. 165, 180, and *Dakin* v. *Bayly*, 290 U. S. 143, 148.

That the Court of Claims has jurisdiction to hear this case is apparent from the provisions of Section 145 of the Judicial Code (App. p. 17).

That petitioners have stated a good cause of action against the United States appears from the discussion and authorities set out above.

A decision by this Court on the aforementioned legal questions would not only prevent an injustice to petitioners herein, but would also resolve the conflicts between the lower courts and dispose of a question of vital interest to the cotton producers of the country.

Conclusion.

For the foregoing reasons, it is respectfully submitted that the petition should be granted.

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July, 1942.

APPENDIX.

Bankhead Cotton Act of 1934 (48 Stat. 598, Amended 48 Stat. 1184, 49 Stat. 776, Repealed 49 Stat. 1106).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Declaration of Policy

That in order to relieve the present acute economic emergency in that part of the agricultural industry devoted to cotton production and marketing by diminishing the disparity between prices paid to cotton producers and persons engaged in cotton marketing and prices of other commodities and by restoring purchasing power to such producers and persons so that the restoration of the normal exchange in interstate and foreign commerce of all commodities may be fostered, and to raise revenue to enable the payment of additional benefits to cotton producers under the Agricultural Adjustment Act—

It is hereby declared to be the policy of Congress to promote the orderly marketing of cotton in interstate and foreign commerce; to enable producers of such commodity to stabilize their markets against undue and excessive fluctuations, and to preserve advantageous markets for such commodity, and to prevent unfair competition and practices in putting cotton into the channels of interstate and foreign commerce, and to more effectively balance production and consumption of cotton.

* * * * * * *

SEC. 3(c). For the crop year 1934-1935 ten million bales is hereby fixed as the maximum amount of cotton of the crop harvested in the crop year 1934-1935, that may be marketed exempt from payment of the tax herein levied. Except as provided in section 2, the allotment plan and the tax is hereby declared to be in effect for the crop year 1934-1935.

Tax and Exemptions.

SEC. 4(a). There is hereby levied and assessed on the ginning of cotton hereafter harvested during a crop year

with respect to which this Act is in effect, a tax at the rate per pound of the lint cotton produced from ginning, of 50 per centum of the average central market price per pound of lint cotton, but in no event less than 5 cents per pound. If the cotton was harvested during a crop year with respect to which the tax is in effect, the tax shall apply even if the ginning occurs after the expiration of such crop year.

* * * * * * *

(e) No tax shall be imposed under this Act with respect to—

(1) Cotton harvested by any publicly owned experimental station or agricultural laboratory.

(2) An amount of cotton harvested in any crop year from each farm equal to its allotment.

(3) Cotton harvested prior to the crop year 1934-1935.

(4) Cotton having a staple of one and one half inches in length or longer.

(f) The tax shall not be collected upon the ginning of cotton which is to be stored by the producer thereof either on the farm or at such other place as may be permitted by regulations prescribed by the Secretary of Agriculture and the Secretary of the Treasury. In such cases, the payment of the tax shall be postponed, but shall be paid at the time when bale tags are secured for such cotton. Bale tags may be secured for any of such cotton at any time after ginning (1) upon the payment to such person as the Commissioner may direct, of the amount of tax which would have been payable at the time of ginning, or (2) upon the surrender of certificates of exemption covering an amount of cotton not less than the amount of such cotton. Until bale tags are secured for such cotton, such cotton shall be subject to a lien in favor of the United States for the amount of the tax payable with respect to the ginning of such cotton. The right to postponement of the payment of the tax under this subsection shall be established in accordance with such regulations as the Secretary of Agriculture and the Secretary of the Treasury may prescribe. The Commissioner, with the approval of the Secretary of the Treasury, shall

prescribe regulations providing for stamping the containers of such cotton so as to indicate the time of ginning and the amount of tax payable with respect thereto.

(g) The right to exemption under paragraph (2) of subsection (e) shall be evidenced by a certificate of exemption issued as herein provided, which certificate of exemption shall be conclusive proof of the right to such exemption.

Apportionment.

SEC. 5. (a) When an allotment is made, in order to prevent unfair competition and unfair trade practices in marketing cotton in the channels of interstate and foreign commerce, the Secretary of Agriculture shall apportion to the several cotton-producing States the number of bales the marketing of which may be exempt from the tax herein levied, * * *.

* * * * * * *

(b) The amount allotted to each State (less the amounts allotted under section 8) shall be apportioned by the Secretary of Agriculture to the several counties in such State * * *.

* * * * * * *

SEC. 7. (a) The amount of cotton allotted to any county pursuant to section 5(b) shall be apportioned by the Secretary of Agriculture to farms on which cotton has been grown within such county.

* * * * * * *

Exemption Certificates.

SEC. 9. (a) Exemption certificates shall be issued by the Secretary of Agriculture, upon application therefor, but only upon proof satisfactory to the Secretary that the producer is entitled thereto pursuant to this Act and the regulations thereunder. Any certificate erroneously issued shall be void upon a demand in writing for its return made by the Secretary of Agriculture to the person to whom such certificate was issued.

* * * * * * *

(d) Any and all certificates of exemption may be transferred or assigned in whole or in part in such manner as the Secretary of Agriculture may prescribe and shall be issued with detachable coupons or in such other form or forms to be prescribed by the Secretary of Agriculture as will facilitate such transfer or assignment. Any person who, in violation of the regulations made by the Secretary of Agriculture, (1) secures certificates of exemption or bale tags from another by sharp practices, or (2) speculates in certificates of exemption or bale tags, and any person securing certificates of exemption or bale tags from another person by fraud or coercion shall, upon conviction thereof, be fined not more than $1,000 or sentenced to not more than one year's imprisonment, or both.

Identification of Tax-paid or Exempt Cotton.

SEC. 10. (a) Upon the payment of the tax on any cotton, or the surrender of exemption certificates covering cotton, the collector receiving such payment or certificates shall deliver to the person so paying or surrendering an appropriate number of bale tags which shall be affixed to such cotton.

* * * * * * *

Regulations by the Commissioner.

SEC. 12. The Commissioner, with the approval of the Secretary of the Treasury, shall prescribe (a) regulations with respect to the time and manner of applying for, issuing, affixing, and destroying bale tags, and the method of accounting for receipts from the sale of and for the use of such bale tags, and (b) such other regulations as he shall deem necessary for the enforcement of the taxing provisions of this Act.

* * * * * * *

General and Penal Provisions.

SEC. 14. (a) All provisions of law, including penalties, applicable with respect to the taxes imposed by section 800 of the Revenue Act of 1926, shall, insofar as applicable and not inconsistent with the provisions of this Act, be applicable with respect to taxes imposed by this Act.

(b) Except as may be permitted by regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury, with due regard for the protection of the revenue, no person shall: (1) Transport, except for storing or warehousing, under the provisions of section 4(f) beyond the boundaries of the county where produced any lint cotton to which a bale tag issued under this Act is not attached; or (2) sell, purchase, or open any bale of lint cotton to which a bale tag issued under this Act is not attached.

* * * * * * *

(d) Any person who willfully violates any provision of this Act, or who willfully fails to pay, when due, any tax imposed under this Act, or who, with intent to defraud, falsely makes, forges, alters, or counterfeits any bale tag or certificate of exemption made or used under this Act, or who uses, sells, or has in his possession any such forged, altered, or counterfeited bale tag or certificate of exemption, or any plate or die used, or which may be used in the manufacture thereof, or has in his possession any bale tag which should have been destroyed as required by this Act, or who makes, uses, sells, or has in his possession any paper in imitation of the paper used in the manufacture of any such bale tag or certificate of exemption, or who reuses any bale tag required to be destroyed by this Act, or who places any cotton in any bale which has been filled and stamped, tagged, or otherwise identified under this Act, without destroying the bale tag previously affixed to such bale, or who affixes any bale tag issued under this Act to any bale of lint cotton on which any tax due is unpaid, or who makes any false statement in any application for bale tags or certificates of exemption under this Act, or who has in his possession any such bale tags or certificates of exemption obtained by him otherwise than as provided in this Act, shall on conviction be punished by a fine not exceeding $1,000, or by imprisonment for not exceeding 6 months, or both.

(e) Any person who willfully violates any regulation issued by the Secretary of Agriculture or the Secretary of

Agriculture and the Secretary of the Treasury under this Act, for the violation of which a special penalty is not provided, shall, on conviction thereof, be punished by a fine not exceeding $200.

Regulations by the Secretary of Agriculture.

SEC. 15. (a) The Secretary of Agriculture is authorized to make such regulations as may be necessary to carry out the powers vested in him by the provisions of this Act.

(b) The Secretary of Agriculture may make regulations protecting the interests of share-croppers and tenants in the making of allotments and the issuance of tax-exemption certificates under this Act.

Appropriations Authorized.

SEC. 16. (a) There is hereby authorized to be appropriated such sums as may be necessary to carry out the provisions of this Act.

(b) Out of the sums available to the Secretary of Agriculture under the Agricultural Adjustment Act, such sums as may be necessary to carry out the provisions of this Act are authorized to be made available.

(c) The proceeds derived from the tax are hereby authorized to be appropriated to be made available to the Secretary of Agriculture for the purposes of carrying out the cotton program of the Agricultural Adjustment Administration, and for administrative expenses and refunds of taxes under this Act.

* * * * * * *

Collection of Taxes.

SEC. 19. The taxes provided for by this Act shall be collected by the Commissioner of Internal Revenue under the direction of the Secretary of the Treasury. Taxes collected shall be paid into the Treasury of the United States.

* * * * * * *

Second Deficiency Appropriation Act, 1938, c. 681, 52 Stat. 1114, 1150-1151:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, to supply deficiencies in certain appropriations for the fiscal year ending June 30, 1938, and for prior fiscal years, to provide supplemental appropriations for the fiscal years ending June 30, 1938, and June 30, 1939, and for other purposes namely:

* * * * * * *

For the refunding, which is hereby authorized, in accordance with rules and regulations to be prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, of all amounts collected by any collector of internal revenue as tax (including penalties and interest) under the Bankhead Cotton Act of 1934 (48 Stat. 598), as amended, the Kerr Tobacco Act (48 Stat. 1275), as amended, and the Potato Act of 1935 (49 Stat. 750), fiscal year 1939, so much of the appropriation in the immediately preceding paragraph as may be requisite is hereby made available for the purposes of and in accordance with the provisions of this paragraph: *Provided,* That no refund shall be made or allowed of any amount paid by or collected from any person as tax under such Acts, unless, after the date of the enactment of this Act, and prior to July 1, 1939, a claim for refund has been filed by such person: *Provided further,* That no refund shall be denied upon the ground that a proceeding to recover had become barred by the limitation provisions of such Acts, or by the provisions of section 3226, as amended, of the Revised Statutes, or by the provisions of section 608 of the Revenue Act of 1928: *Provided further,* That in the absence of fraud all findings of fact and conclusions of law of the Commissioner of Internal Revenue upon the merits of any such claim for refund, and the mathematical calculations made in connection therewith, shall not be subject to review by any court or by any other officer, employee, or agent of the

United States: *Provided further,* That no refund of any tax shall be made under this paragraph unless liability for the payment of such tax was satisfied by the payment of money: *Provided further,* That no interest shall be allowed in connection with any refund made under the authority of this paragraph: *Provided further,* That in the case of amounts paid as tax under the Bankhead Cotton Act of 1934 with respect to the ginning of cotton (a) refund shall be allowed to the ginner of the cotton only to the extent that the ginner has not shifted the burden of the tax by including it in any charge or fee for ginning, or by collecting it from the owner or owners of the cotton ginned, or in any manner whatsoever, and (b) refund shall be allowed to the owner or owners of the cotton at the time of ginning, to the extent that the amount of tax was shifted to such owner or owners by the cotton ginner and was not shifted by such owner or owners to other persons, and in such cases, but only for the purposes of this paragraph, the tax shall be considered to have been paid by the ginner to the United States for the account of such owner or owners. No part of the amount of any refund made under this paragraph in excess of 10 per centum of the amount of such refund shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with such refund, and the same shall be unlawful, any contract to the contrary notwithstanding; and any person violating the provisions of this sentence shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding $1,000.

* * * * * * *

Judicial Code, Section 145. (28 U. S. C. Sec. 250.)

The Court of Claims shall have jurisdiction to hear and determine the following matters:

(1) *Claims against United States.* First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or

implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: * * *. (Mar. 3, 1887, c. 359, Sec. 1, 24 Stat. 505; Mar. 3, 1911, c. 231, Sec. 145, 36 Stat. 1136.)

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 199

J. H. CRAIN AND R. E. LEE WILSON, JR., TRUSTEES OF LEE WILSON & COMPANY, A BUSINESS TRUST, PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court below (R. 6–17) is reported in 44 F. Supp. 321.

JURISDICTION

The judgment of the Court of Claims was entered April 6, 1942 (R. 17). The petition for a writ of certiorari was filed July 2, 1942. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether a producer and ginner of cotton who purchased tax exemption certificates from a pool established by the Secretary of Agriculture and thereafter surrendered the certificates to the Collector of Internal Revenue in lieu of payment of the ginning tax can recover from the United States the amount paid for the certificates.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Act of April 24, 1934, c. 157, 48 Stat. 598, known as the Bankhead Cotton Act, and of the other statutes involved are set forth in the Appendix, *infra,* pp. 11–16. The Bankhead Cotton Act was repealed February 10, 1936 (c. 42, 49 Stat. 1106). Its provisions may be summarized as follows for purposes of this case:

The Act imposed a tax of not less than five cents per pound of lint cotton upon the ginning of cotton harvested during a crop year in excess of a quota allotted to each producer by the Secretary of Agriculture pursuant to the Act (Section 4). Upon payment of the tax or, in the alternative, upon surrender of tax exemption certificates, the producer could obtain bale tags from the Collector of Internal Revenue (Section 10 (a)). With certain exceptions, no person could transport, sell, or purchase any bale of lint cotton not having a bale tag affixed to it (Section 14). If a producer stored his cotton as permitted by regulations of the Sec-

retary, no tax or exemption certificate would be collected until such time as he chose to secure bale tags (Section 4 (f)).

The maximum total of allotted quotas for the crop year 1934–1935 was declared to be ten million bales (Section 3 (c)). Upon application the Secretary of Agriculture was empowered to issue exemption certificates covering up to that amount (Section 9 (a)). All such certificates were transferable in such manner as the Secretary might prescribe and in such form as he might prescribe to facilitate transfer of them (Section 9 (d)).

The Secretary issued regulations (Appendix, *infra,* pp. 17–20) under which producers having exemption certificates in amounts greater than were needed to obtain bale tags for their cotton might sell or assign their surplus certificates to other producers (Art. X, Secs. 102, 103). In addition, by executing certain trust agreements producers were permitted to transfer their surplus exemption certificates to a national pool which was created by the regulations and operated under governmental supervision (Art. X, Sec. 104 (a) (c)). The exemption certificates which were transferred to the pool were to be cancelled, but the manager of the pool could then sell to other producers a like amount of exemption certificates issued by the Secretary for such purposes. Subject to change by the Secretary the selling price was at the rate of four cents per pound of cotton

covered by the certificates sold (Art. X, Sec. 104 (e)). Payments were to be made to the pool manager and were to be deposited with the Treasurer of the United States under a special symbol number (Art. X, Sec. 104 (e) (3), (g)). The funds remaining in the pool after deduction of expenses were required to be distributed pro rata to the producers who had surrendered surplus certificates to the pool under the trust agreements (Art. X, Sec. 104 (h)).

STATEMENT

Petitioners are the trustees of Lee Wilson & Company, a common-law business trust engaged since prior to 1934 in the production, ginning and sale of cotton (R. 1). On November 12, 1940, they brought this suit against the United States under Section 145 (1) of the Judicial Code (Appendix, *infra,* p. 11) to recover $65,923.32 with interest (R. 1–5). This sum, exclusive of interest, represented the amount of so-called surplus cotton tax exemption certificates alleged to have been bought by petitioners on various dates between October 23, 1934, and February 9, 1935, for the use of the trust in meeting the requirements of the Bankhead Cotton Act.[1] Petitioners alleged that the Act was

[1] With the exception of the certificates bought on October 23, 1934, for $1,000.00, all of the alleged purchases were made within six years of the filing of the present suit, which is the statutory period of limitation. Section 156 of the Judicial Code (28 U. S. C. § 262).

unconstitutional and that their payments for the certificates had been made under duress and been collected by the United States unlawfully (R. 2–4). The case was heard upon a demurrer filed by the United States (R. 5). The Court of Claims sustained the demurrer and dismissed the petition (R. 17).

The petition alleged the following facts:

Petitioners bought the exemption certificates from E. L. Deal, the manager of a pool established for the purpose of selling such certificates. Petitioners paid for the certificates by checks payable to Deal. He endorsed the checks over to the United States and they were covered into the general fund of the Treasury. Petitioners presented the certificates to the Collector of Internal Revenue in payment of the ginning tax on the cotton which was subject thereto. The Collector received the certificates as payment in full of the tax and issued bale tags for the cotton (R. 2). Thereafter, on November 30, 1938, and again on June 26, 1939, petitioners filed claims for refund with the Collector, demanding refund of the amount paid for the certificates. These claims were rejected by the Commissioner of Internal Revenue on May 23, 1939, and August 21, 1939, respectively. Petitioners later made demand upon the Comptroller General of the United States, the Secretary of the Treasury, and the Secretary of Agriculture for refund of the amounts paid for these certificates but no refund was ever made (R. 3).

The Court of Claims, in sustaining the demurrer, indicated that in view of the decisions in *Mulford* v. *Smith,* 307 U. S. 38, and *United States* v. *Darby,* 312 U. S. 100, it did not think petitioners were warranted in assuming, without more fully showing, that the Bankhead Cotton Act was unconstitutional (R. 8–9). It held that whether or not the Act was valid petitioners were not entitled to recover since they had paid no tax to the United States (R. 9–15). Judge Madden concurred on the ground that no showing had been made sufficient to overcome the presumption that the Act was constitutional and that, therefore, it was unnecessary to decide whether petitioners might recover if the Act was invalid (R. 16). Judge Whitaker dissented (R. 16–17).

ARGUMENT

1. On the assumption that the Court of Claims held that the Bankhead Cotton Act was constitutional, petitioners assert (Pet. 5–7) a conflict with the decisions in *Thompson* v. *Deal,* 92 F. (2d) 478 (App. D. C.), and *United States* v. *Moor,* 93 F. (2d) 422 (C. C. A. 5).[2] However, it is clear from

[2] Petitioners also assert (Pet. 6) conflicts with *United States* v. *Butler,* 297 U. S. 1, and *Stahmann* v. *Vidal,* 305 U. S. 61. Only the second of these cases involved the Bankhead Cotton Act and the question of constitutionality was not before the Court or decided by it, certiorari having been limited to the question whether the petitioners, who were producers and not ginners, were the proper parties to sue the collector of internal revenue to recover taxes paid in money.

the opinion that the court did not determine the question of constitutionality. The court stated specifically that it was unnecessary to hinge its decision on the "uncertainty" with respect to constitutionality (R. 9) and proceeded to hold that petitioners could not recover even if the Act was invalid (R. 9–15).

If the court had sustained the validity of the Act, there nevertheless would be no sufficient reason to review the question since such a review would be unnecessary to affirmance of the judgment and since the Act has been repealed (*supra,* p. 2). Moreover, the decisions relied on by petitioners as presenting a conflict antedate the decision of this Court in *Mulford* v. *Smith, supra,* which upheld a statute similar to the Bankhead Cotton Act.

2. The holding that petitioners could not recover from the United States whether or not the Act was valid is correct and not in conflict with the decision of any other court.

The Second Deficiency Appropriation Act of 1938 (Appendix, *infra,* pp. 11–12) authorized, and appropriated sums for, the refunding of all amounts collected as tax under the Bankhead Cotton Act and two other statutes. However, it provided that the Commissioner's determinations of claims for refund should be final in the absence of fraud and that "no refund of any tax shall be made under this paragraph unless liability for the payment of such tax was satisfied by the payment of money."

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From these provisions it is plain that petitioners could not recover under that statute, the Commissioner having rejected their claims for refund and their tax liability having been satisfied, not by the payment of money, but by the surrender of exemption certificates to the collector. *Cook* v. *United States,* 115 F. (2d) 463 (C. C. A. 5). Indeed, it is arguable that these specific provisions should be construed also as limiting any right otherwise existing to recover under the Tucker Act (28 U. S. C. § 41(20)) or under the similar general provisions of Section 145 of the Judicial Code. This construction was adopted in the *Cook* case where the Tucker Act was invoked, but was rejected by the Court of Claims in the instant case (R. 10).

Assuming that the Second Deficiency Appropriation Act is not a limitation upon suits brought under Section 145, it is none the less clear that petitioners may not recover. Their checks to Deal as manager of the pool were payments for exemption certificates which they had elected to buy for use in lieu of paying taxes and, although the petition alleges that their checks were covered into the general fund of the Treasury, it is apparent as a matter of law under the controlling regulations quoted in the Appendix (*infra,* pp. 17–20) and hereinbefore summarized (*supra,* p. 3), that the United States received the payments as trustee and, after deducting expenses, was obligated to distribute them pro rata to the producers who had surren-

dered certificates to the pool.[3] The United States, therefore, is no more obligated to petitioners than it is to producers who, instead of buying certificates from the pool, bought them directly from other producers as permitted by the regulations. In neither case may any contract on the part of the United States to reimburse the producers be implied in fact; and a contract implied in law, if one existed, would be an insufficient basis for recovery under Section 145 or the Tucker Act. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415; *Merritt* v. *United States*, 267 U. S. 338; *United States* v. *Minnesota Investment Co.*, 271 U. S. 212.

In the cases which are asserted (Pet. 7–8) to conflict in principle with the holding of the Court of Claims that the United States is not obligated to petitioners, the United States wrongfully exacted fines or taxes which it held for its own benefit.[4]

[3] Petitioners complain (Pet. 8–9) that the Court of Claims failed to give effect to the allegation that their checks were covered into the general fund of the Treasury. Conceding that the demurrer admitted the allegation, it did not admit any legal consequence of the fact alleged and the regulations are conclusive that the United States received the money only as trustee. *Nortz* v. *United States*, 294 U. S. 317, 324–325; *United States* v. *Ames*, 99 U. S. 35; *Finney* v. *Guy*, 189 U. S. 335; *St. Louis, Etc., Railroad* v. *United States*, 267 U. S. 346, 349; *Pennie* v. *Reis*, 132 U. S. 464, 470.

[4] *United States* v. *Compagnie Generale Transatlantique*, 26 F. (2d) 195 (C. C. A. 2); *Sinclair Nav. Co.* v. *United States*, 32 F. (2d) 90 (C. C. A. 5); *Carriso, Inc.*, v. *United States*, 106 F. (2d) 707 (C. C. A. 9); *Bull* v. *United States*, 295 U. S. 247.

The amounts here involved it received and held only as trustee.

The other alleged conflicts of decision likewise afford no reason for certiorari. The Court of Claims expressed (R. 14) the view that petitioners did not pay the amounts involved under duress. But since this conclusion was not necessary to the decision, the alleged conflicts with *Thompson* v. *Deal*, 92 F. (2d) 478 (App. D. C.), and *Stahman* v. *Vidal*, 305 U. S. 61, do not call for review. The latter case, moreover, did not involve payments for tax exemption certificates (see footnote 2, *supra*, p. 6), and in *Thompson* v. *Deal*, which was a suit against the pool manager and others, the court held that the United States had no pecuniary interest in the payments and, therefore, that the suit was not one against it.

CONCLUSION

For the reasons stated the petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
ELIZABETH B. DAVIS,
Special Assistants to the Attorney General.

AUGUST 1942.

APPENDIX

Section 145 of the Judicial Code (28 U. S. C. §250):

> The Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> (1) *Claims against United States.* First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an executive department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: * * *

Second Deficiency Appropriation Act, 1938, c. 681, 52 Stat. 1114, 1150–1151:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the following sums are appropriated, out of any money in the Treasury not otherwise appropriated, to supply deficiencies in certain appropriations for the fiscal year ending June 30, 1938, and for prior fiscal years, to provide supplemental appropriations for the fiscal years ending June 30, 1938, and June 30, 1939, and for other purposes namely:
>
> * * * * *
>
> For the refunding, which is hereby authorized, in accordance with rules and regula-

tions to be prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, of all amounts collected by any collector of internal revenue as tax (including penalties and interest) under the Bankhead Cotton Act of 1934 (48 Stat. 598), as amended, the Kerr Tobacco Act (48 Stat. 1275), as amended, and the Potato Act of 1935 (49 Stat. 750), fiscal year 1939, so much of the appropriation in the immediately preceding paragraph as may be requisite is hereby made available for the purposes of and in accordance with the provisions of this paragraph: *Provided,* That no refund shall be made or allowed of any amount paid by or collected from any person as tax under such Acts, unless, after the date of the enactment of this Act, and prior to July 1, 1939, a claim for refund has been filed by such person: *Provided further,* That no refund shall be denied upon the ground that a proceeding to recover had become barred by the limitation provisions of such Acts, or by the provisions of section 3226, as amended, of the Revised Statutes, or by the provisions of section 608 of the Revenue Act of 1928: *Provided further,* That in the absence of fraud all findings of fact and conclusions of law of the Commissioner of Internal Revenue upon the merits of any such claim for refund, and the mathematical calculations made in connection therewith, shall not be subject to review by any court or by any other officer, employee, or agent of the United States: *Provided further,* That no refund of any tax shall be made under this paragraph unless liability for the payment of such tax was satisfied by the payment of money: * * *

Bankhead Cotton Act of 1934, c. 157, 48 Stat. 598–607:

SEC. 3.

* * * * * *

(c) For the crop year 1934–1935 ten million bales is hereby fixed as the maximum amount of cotton of the crop harvested in the crop year 1934–1935, that may be marketed exempt from payment of the tax herein levied. Except as provided in section 2, the allotment plan and the tax is hereby declared to be in effect for the crop year 1934–1935.

TAX AND EXEMPTIONS

SEC. 4. (a) There is hereby levied and assessed on the ginning of cotton hereafter harvested during a crop year with respect to which this Act is in effect, a tax at the rate per pound of the lint cotton produced from ginning, of 50 per centum of the average central market price per pound of lint cotton, but in no event less than 5 cents per pound. If the cotton was harvested during a crop year with respect to which the tax is in effect, the tax shall apply even if the ginning occurs after the expiration of such crop year.

* * * * *

(e) No tax shall be imposed under this Act with respect to—

* * * * *

(2) An amount of cotton harvested in any crop year from each farm equal to its allotment.

* * * * *

(f) The tax shall not be collected upon the ginning of cotton which is to be stored by

the producer thereof either on the farm or at such other place as may be permitted by regulations prescribed by the Secretary of Agriculture and the Secretary of the Treasury. In such cases, the payment of the tax shall be postponed, but shall be paid at the time when bale tags are secured for such cotton. Bale tags may be secured for any of such cotton at any time after ginning (1) upon the payment to such person as the Commissioner may direct, of the amount of tax which would have been payable at the time of ginning, or (2) upon the surrender of certificates of exemption covering an amount of cotton not less than the amount of such cotton. Until bale tags are secured for such cotton, such cotton shall be subject to a lien in favor of the United States for the amount of the tax payable with respect to the ginning of such cotton. * * *

(g) The right to exemption under paragraph (2) of subsection (e) shall be evidenced by a certificate of exemption issued as herein provided, which certificate of exemption shall be conclusive proof of the right to such exemption.

* * * * *

EXEMPTION CERTIFICATES

SEC. 9. (a) Exemption certificates shall be issued by the Secretary of Agriculture, upon application therefor, but only upon proof satisfactory to the Secretary that the producer is entitled thereto pursuant to this Act and the regulations thereunder. Any certificate erroneously issued shall be void upon a demand in writing for its re-

turn made by the Secretary of Agriculture to the person to whom such certificate was issued.

(b) The right to a certificate of exemption shall be evidenced in such manner as the Secretary of Agriculture may by regulations prescribe.

(c) The certificate of exemption shall specify the amount of cotton exempt from the tax under section 4 (e) (2).

(d) Any and all certificates of exemption may be transferred or assigned in whole or in part in such manner as the Secretary of Agriculture may prescribe and shall be issued with detachable coupons or in such other form or forms to be prescribed by the Secretary of Agriculture as will facilitate such transfer or assignment. Any person who, in violation of the regulations made by the Secretary of Agriculture, (1) secures certificates of exemption or bale tags from another by sharp practices, or (2) speculates in certificates of exemption or bale tags, and any person securing certificates of exemption or bale tags from another person by fraud or coercion shall, upon conviction thereof, be fined not more than $1,000 or sentenced to not more than one year's imprisonment, or both.

IDENTIFICATION OF TAX-PAID OR EXEMPT COTTON

SEC. 10. (a) Upon the payment of the tax on any cotton, or the surrender of exemption certificates covering cotton, the collector receiving such payment or certificates shall deliver to the person so paying or surren-

dering an appropriate number of bale tags which shall be affixed to such cotton.

* * * * *

GENERAL AND PENAL PROVISIONS

SEC. 14. * * * (b) Except as may be permited by regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury, with due regard for the protection of the revenue, no person shall: (1) Transport, except for storing or warehousing, under the provisions of section 4 (f) beyond the boundaries of the county where produced any lint cotton to which a bale tag issued under this Act is not attached; or (2) sell, purchase, or open any bale of lint cotton to which a bale tag issued under this Act is not attached.

(c) No seed cotton harvested during a crop year with respect to which the tax is in effect shall be exported from the United States or any possession thereof to which this Act applies to any possession of the United States to which this Act does not apply or to any foreign country.

* * * * *

REGULATIONS BY THE SECRETARY OF AGRICULTURE

SEC. 15. (a) The Secretary of Agriculture is authorized to make such regulations as may be necessary to carry out the powers vested in him by the provisions of this Act.

(b) The Secretary of Agriculture may make regulations protecting the interests of share-croppers and tenants in the making of allotments and the issuance of tax-exemption certificates under this Act.

* * * * *

COLLECTION OF TAXES

SEC. 19. The taxes provided for by this Act shall be collected by the Commissioner of Internal Revenue under the direction of the Secretary of the Treasury. Taxes collected shall be paid into the Treasury of the United States.

* * * * *

Regulations B. A. 19C prescribed by the Secretary of Agriculture under the Bankhead Cotton Act:[5]

ARTICLE X. TRANSFER OF CERTIFICATES

* * * * *

SEC. 102. *Surplus certificates.*—Certificate(s) not needed by a producer for securing bale tags may be sold, assigned, or transferred but only under the following conditions:

If the producer possesses an amount of certificate(s) in excess of the amount needed by him to procure bale tags for his cotton, he may execute and file with the Assistant in Cotton Adjustment (in and for the county in which the certificate(s) were distributed) a statement (upon a prescribed form) showing that he desires to offer such amount for local sale or for surrender into the national Surplus Cotton Tax-Exemption Certificate Pool and— * * *

SEC. 103. *Local sales and procedure.*—(a) Any producer holding such surplus certificate(s) may sell, barter, exchange, or assign to any other cotton producer situated within the county where originally issued (or reissued) the remaining unused portion(s) of

[5] Article X was prescribed September 5, 1934.

his certificate(s) at the price fixed under section 104 of these regulations. * * *

SEC. 104. *National Surplus Cotton Tax-Exemption Certificate Pool and participation therein.*—In order to provide facilities for a general transfer of surplus certificates and thereby increase the benefits which may accrue to cotton producers holding surplus certificate(s) and at the same time provide reasonable means whereby producers whose exemption exceeds their allotments may share to a certain extent in the advantage of such a transfer, there is hereby created a National Surplus Cotton Tax-Exemption Certificate Pool (hereinafter referred to as the pool). The pool shall be opened, maintained, operated, and closed as prescribed below:

(a) The pool shall be operated under the general supervision of the Cotton Production Section of the Agricultural Adjustment Administration, subject to the approval of the Administrator. A Certificate Pool Manager (hereinafter referred to as the manager) will be designated by the Chief, Cotton Production Section of the Agricultural Adjustment Administration, with the approval of the Administrator of the Agricultural Adjustment Administration, Department of Agriculture. Such manager shall receive and manage and sell or dispose of surplus certificate(s) under trust agreements executed (on a prescribed form) by the several producers participating in the pool.

* * * * *

(c) Any Assistant in Cotton Adjustment is authorized to accept from any producer

(operating a producer unit respecting which application for certificate(s) was made in his county) a portion or all of such producer's surplus certificate(s) if accompanied by a trust agreement executed in accordance with these regulations and shall give such producer a receipt therefor endorsed on the producer's copy of his trust agreement. Such certificate(s), so surrendered, shall be promptly placed in the pool. Each producer so surrendering surplus certificate(s) shall in such trust agreement appoint the manager as his trustee and authorize the manager to receive such certificate(s) and handle them as prescribed in these regulations and sell such certificate(s) or any portion thereof to other producers who may desire to purchase the same in accordance with these regulations. Every certificate received in the pool shall be accurately recorded as to all particulars and shall then be cancelled and destroyed.

* * * * *

(e) The manager will receive from the Secretary, as required, blank certificates which shall be used for the purpose of sale to producers to the extent of and in the place of the certificates so surrendered by producers to the pool. In order to expedite the service, a supply of such blank certificates (properly endorsed to indicate their character) shall be consigned to each Assistant in Cotton Adjustment to the extent of his reasonable request in order to be able to supply the market therefor in his county. Any such Assistant may sell such certificates under the following conditions:

(1) All sales shall be made at a rate per pound (of tax-exempt cotton expressed in

the certificate) fixed by the Secretary, who may if he sees fit change the price from time to time, and the same price shall prevail throughout all cotton-producing counties for the time such price is in effect. Such price is hereby fixed at four cents per pound, which price shall remain in effect unless and until another price is fixed by the Secretary.

* * * * *

(3) Payment for such certificate(s) so purchased shall be made only by certified check, bank draft, or postal money order, made payable to the order of "Certificate Pool Manager."

* * * * *

(g) All funds in the form of checks, drafts, or money orders received in payment for certificates sold from the pool shall be deposited with the Treasurer of the United States through the Comptroller of the Agricultural Adjustment Administration, Department of Agriculture, under a special symbol number. All disbursements from such funds (whether on account of expenses or dividends to producers) shall be made by said Comptroller but only upon a voucher, warrant, or other written authorization drawn by the manager (or such other person or persons as may from time to time be designated by the Secretary) and approved by said Comptroller. * * * All expenses incident to the operation of the pool (but not including salaries of the manager or the Assistants in Cotton Adjustment) shall be deducted from the gross receipts.

(h) The funds remaining in the pool, after deduction of all such expenses as provided above, shall be distributed pro rata to

producers in the proportion which the number of pounds represented by the certificate(s) surrendered into the pool by each producer bears to the total number of pounds represented by all certificates surrendered into the pool.

* * * * *

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Supreme Court of the United States.

OCTOBER TERM, 1942.

No. 199.

J. H. CRAIN AND R. E. LEE WILSON, JR., Trustees of Lee Wilson & Company, A Business Trust, *Petitioners*,

v.

THE UNITED STATES.

On Petition For a Writ of Certiorari to the Court of Claims.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

On July 2, 1942, petitioner filed its petition for a writ of certiorari and stated its reasons for the granting of the writ. In due time the United States filed its brief in opposition to the granting of the writ and this reply brief is directed to that brief in opposition.

1. *The Bankhead Cotton Act Was Unconstitutional.*

The petition alleges that the decision of the Court of Claims is in conflict with *Thompson* v. *Deal*, 92 F. (2d) 478 (C.A.D.C.); *United States* v. *Moor*, 93 F. (2d) 422 (5 C.C.A.); and *Stahmann* v. *Vidal* (N. Mex. Dist. Ct.), wherein the Bankhead Cotton Act was held to be unconstitutional.

Respondent urges in reply (Br. 6–7) that the Court of Claims did not pass upon the question of the constitutionality of the Act. This statement comes as a surprise when the Court of Claims devoted nearly two pages (R. 8–9) to a discussion of that question and then stated that "we do not think the plaintiffs

are justified in assuming * * * that the Bankhead Act was unconstitutional"; when one Judge concurred in the decision on the ground that petitioners had made no showing "to overcome the presumed constitutionality of the Bankhead Act" (R. 16); and when another Judge dissented on the ground that the Act was unconstitutional (R. 17).

Of course, the Court of Claims decided that the Bankhead Act was constitutional (inferentially, if not in exact words). That question was alleged in the petition before the Court (R. 4) and *had* to be disposed of on the demurrer.

In the Government's brief to this Court (filed April 9, 1938) in opposition to the granting of certiorari in *Stahmann et al.* v. *Vidal* (October Term, 1938, No. 12), Mr. Justice Robert H. Jackson, the Solicitor General, stated (pp. 14–15):

> The constitutionality of that [Bankhead Cotton] Act is the only question involved in *United States* v. *Lee Moor*, No. 854, present Term, now pending before this Court on petition for certiorari filed by the United States. Questions relating to the validity of the Bankhead Cotton Act are not materially different from the questions relating to constitutionality of the Kerr-Smith Tobacco Act, c. 866, 48 Stat. 1275. That Act was held unconstitutional by the Circuit Court of Appeals for the Sixth Circuit in *Glenn* v. *Smith*, 91 F. (2d) 447, and the petition for certiorari, No. 599, present Term, was denied by this Court on March 28, 1938. If similar disposition is made of the petition for certiorari in *United States* v. *Lee Moor*, *supra*, [which was done, 303 U. S. 663] and if the Court should grant the instant petition for certiorari, the Government suggests that it be limited to the question decided by the court below.

From the language quoted, it is perfectly obvious that the Government recognized at that time that the Bankhead Cotton Act was unconstitutional, when it stated that questions relating to its validity "are not materially different from the questions relating to constitutionality of the Kerr-Smith Tobacco Act," which act had already been held invalid. Clearly the Government admitted in that case that the Bankhead Act

was unconstitutional when it requested this Court (p. 15 of its brief), in granting certiorari, to limit its consideration to the question of whether the cotton producers were the proper parties to sue for the refund rather than the ginner of the cotton. It is hard to believe that this Court in granting certiorari in that case would have so limited the question if it did not understand the Government's position to be that the Bankhead Act was unconstitutional and if it did not agree with that position.

Respondent's representation in this case that the Court of Claims "did not determine the question of constitutionality" (Br. 7) appears to be unwarranted. The petition before the Court alleged unconstitutionality and the Court was compelled to overrule that allegation in order to sustain the demurrer, because a tax collected under an unconstitutional statute always gives rise to a valid claim for refund.

Even though respondent states that the Court of Claims did not determine the question of constitutionality of the Bankhead Act, it suggests (Br. 7) that *Mulford* v. *Smith*, 307 U. S. 38, overrules the decisions relied upon by petitioners as being in conflict with the holding of the Court of Claims, and states that that decision upheld a statute similar to the Bankhead Cotton Act. Inferentially then respondent admits that the Court of Claims *did* uphold the validity of the Bankhead Act. This puts the decision in direct conflict with the holdings set out on pages 5 and 6 in the petition for certiorari, as stated therein, and justifies the petition on that ground.

2. *The Second Deficiency Appropriation Act of 1938 Is Not Applicable.*

Respondent (Br. 7) urges that the Court of Claims was correct in holding that petitioners could not recover from the United States, whether or not the Bankhead Act was valid. In support of this position, it relies upon the provisions of the Second Deficiency Appropriation Act of 1938. That act provided that no refund of the Bankhead tax should be made unless the tax was paid *in money to the Collector*.

The Bankhead Cotton Act provided that all cotton which a

farmer produced in excess of his allotment (made by the Secretary of Agriculture) was subject to a tax which had to be paid before he could sell his cotton. The tax could be paid in money at approximately five cents per pound or in exemption certificates which he could purchase under regulations of the Secretary of Agriculture at approximately four cents per pound. *The tax had to be paid to the Collector of Internal Revenue either in money or in exemption certificates* before the farmer received from the Collector bale tags which permitted him to market his cotton. It was these payments made to the Collector *in money* that were made refundable under the Second Deficiency Appropriation Act of 1938. The petitioners are suing for the money which they paid for exemption certificates to agents of the Secretary of Agriculture. Clearly, the Second Deficiency Appropriation Act is no bar to recovery and the Court of Claims so held (R. 10).

The case of *Cook* v. *United States*, 115 F. (2d) 463 (5 C.C.A.), relied upon by respondent, does not support respondent's position. It is true that, from a reading of the Court's opinion, it is difficult to ascertain the grounds of recovery set forth in the original complaint, but an inspection of the complaint filed in the District Court in that case, shows clearly that the claim is based solely upon the provisions of the Second Deficiency Appropriation Act of 1938. (A certified copy of the complaint filed in the District Court is being lodged with the Clerk of this Court as evidence of this statement.) In appealing to the Circuit Court in the *Cook* case, the petitioner invoked the Tucker Act, but, not having commenced the action under the provisions of that Act, he was precluded from availing himself of it in the Circuit Court. The *Cook* case, therefore, does not support respondent here, where the Tucker Act was invoked in the original complaint (R. 3–4, paragraphs 10, 11, 14, and 15).

3. *Petitioners' Payments Were Covered Into the General Fund.*

Respondent's next contention (Br. 8–9) is that, when petitioners purchased tax exemption certificates from E. L. Deal,

the pool manager and agent of the Secretary of Agriculture, the United States received the money as a trustee for the cotton producers who produced less cotton than their allotments. The Court of Claims took the position that "not one penny of the amount paid into the pool went into the general fund of the Treasury of the United States" and that "the United States had no pecuniary interest in the fund as such" (R. 15). That, however, does not appear to be the question. The real question is: Did the United States, as trustee or otherwise, take the money of petitioners under compulsion and in the guise of a tax, under a law later held to be invalid, and, having done so, should it not repay same?

The petition in the Court of Claims alleges that the amounts *collected from petitioners* were covered into the general fund of the Treasury of the United States (R. 4). Because the case was considered on demurrer, petitioners had no opportunity to prove this fact and the Court disregarded the allegation and determined otherwise.

The case of *S. R. Brackin* v. *The United States*, 44 F. Supp. 327 (now on petition for certiorari in this Court, October Term, 1942, No. 363) was pending in the Court of Claims while the instant case was pending there. The Court decided that case on the evidence before it. One of the findings was that no funds received in connection with the pools were covered into the general fund of the Treasury and that the United States did not profit or receive any benefit from such funds (R. 9 of *Brackin* case).

After the Government had received a favorable decision from the Court of Claims and after the time had expired in which to file a motion for a rehearing under that Court's rules, the Government filed a motion for leave to file a motion out of time (p. 21 of the Brackin record). Attached to said proposed motion were a letter from the Department of Justice to the Treasury Department and a reply from the latter to the former. The purport of those letters is that the money paid by the cotton producers to Deal as the agent of the Secretary of Agriculture *did* go into the general fund of the United States

and that the United States could have appropriated the money for some other purpose. (See motion and letters attached to the petition for certiorari in the *Brackin* case.) Obviously, the Assistant Attorney General did not want to be charged with the responsibility of having induced an erroneous decision from the Court of Claims and, even though too late under the Court's rules, sought by said motion to call the Court's attention to its erroneous finding and holding. No other reasons appear for the unusual action of the Assistant Attorney General.

Thus, it appears that the Court of Claims was led into an erroneous finding and decision in the *Brackin* case, which doubtless induced the Court of Claims to take an erroneous position in the instant case, when it failed to accept as admitted for the purpose of the demurrer the facts pleaded in the petition. Petitioner admits that the Court of Claims could hardly have decided the *Brackin* case one way and the instant case the opposite way, but the error of the Court of Claims was in deciding both cases wrong. Obviously, the Assistant Attorney General is now in agreement with this last proposition.

This last position taken by the Department of Justice and the Treasury Department in the *Brackin* case is in line with the position taken by the Department of Agriculture in its Regulations B.A. 219 as amended March 6, 1935, wherein it said:

> Sec. 61 (a)(6). If the Board finds that the certificate has been stolen, the Division of Cotton shall cause notice of such theft and a copy of the report of the Board's investigation to be delivered to the Solicitor of the United States Department of Agriculture for possible action by the United States Department of Justice with a view to investigation and to prosecution for theft of Government property (since such certificate is the property of the United States until it is delivered to the producer or trustee named therein).
>
> * * * * * * * * *
>
> Sec. 61 (b)(5). If the Board finds that the certificate has been stolen, the Division of Cotton shall cause notice of such theft and a copy of the report of the Board's investigation to be delivered to the Solicitor of the United States Department of Agriculture or possible action by the

> United States Department of Justice with a view to investigation and to prosecution for theft of Government property (since such certificate is the property of the United States until it is delivered to the producer or trustee named therein).

It would seem that, if the United States were selling *its property*, the money received therefor belonged to the United States and should have gone into the general fund of the United States, as the Assistant Attorney General would now have the Court of Claims hold.

4. *Facts Well Pleaded Must Be Accepted on Demurrer.*

In a foot note on page 9 of its brief, respondent admits that the Court of Claims erroneously failed, in ruling on the demurrer, to give effect to the allegation in the petition that the checks paid by petitioner for exemption certificates were covered into the general fund of the United States, but suggests that the legal effect of that fact must give way to the regulations of the Department of Agriculture. There is nothing sacred about self-serving regulations. Respondent's suggestion might be entitled to some consideration if the Assistant Attorney General had not sought to correct the Court's decision in the *Brackin* case (by correcting the facts) as pointed out above.

5. *The United States Is Liable to Petitioners Regardless of its Liability to Others.*

On page 9 of its brief, respondent makes the assertion that the United States is no more obligated to make restitution to petitioners, than it is to make restitution to producers who bought exemption certificates from other producers. The Court of Claims emphasized the same argument. It is a queer doctrine that one can successfully avoid making amends for a wrong, just because he is not liable to another party who has been wronged in the same manner by someone else. Such an argument or such a defense should not be countenanced.

6. *The Payments of Petitioners Were Made Under Duress.*

Respondent states (Br. 10) that it was not necessary for the Court of Claims (in order to reach its decision) to hold as it did that purchases of exemption certificates by petitioners were not made under duress. Respondent could hardly contend here that there was no duress in view of this Court's decision in *Stahmann* v. *Vidal*, 305 U. S. 61.

SUMMARY.

Respondent's contentions may be summarized as follows:

Respondent has suggested in its brief that the Court of Claims did not pass upon the constitutionality of the Bankhead Cotton Act, but this suggestion has been shown to be erroneous. Respondent has suggested that, even if the Bankhead Act were invalid, petitioners could not recover because of the provisions of the Second Deficiency Appropriation Act of 1938, but that Act did not apply to facts such as are found in this case and the Court of Claims so held. Respondent has suggested that the United States in accepting money for exemption certificates, acted only as trustee for the farmers who did not produce their full allotment of cotton and that the United States had no interest in and received no benefit from the fund, but this contention has been refuted by its own action in suggesting the opposite in its belated motion in the *Brackin* case. Respondent has admitted that the Court of Claims should have given effect to the allegation in the petition that the money paid for exemption certificates was covered into the general fund of the United States, but contends that the legal effect of such a holding is controlled by self-serving regulations of the Department of Agriculture. This contention is exploded, however, by its own action in the *Brackin* case referred to above. Respondent has contended that it is not liable to make restitution to petitioners, whose money it took under compulsion, because it is not liable to make restitution to someone else whose money it did not take. The Court of Claims held that there was no duress when it

took the money of petitioners under an invalid act, but respondent, realizing that such a position conflicts with this Court's holding in *Stahmann* v. *Vidal, supra,* suggests that it was not necessary for the Court to make such a holding.

Such are respondent's contentions and representations to this Court. In other words it asks this Court to deny the writ on grounds, everyone of which has been shown herein to be without merit. The words of the Circuit Court of Appeals, Eighth Circuit, in *Christie-Street Commission Co.* v. *United States,* 136 Fed. 326, 329, seem appropriate here:

> There are few more grievous wrongs than the denial by a nation of a hearing and trial of the just claims which its citizens may have against it. * * * Justice demands, and a wise public policy requires, that nations should submit themselves to the judgments of impartial tribunals, to the enforcement of their contracts and to satisfaction of their wrongs, as universally as individuals.

WHEREFORE, it is submitted that the writ of certiorari should be granted.

Respectfully submitted,

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